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IN THE

Supreme Court of the United States

October Term, 1944.

No. 657

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY, and LOUIS SEGAL,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

CHARLES M. PALMER,
Counsel for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

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SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY, and LOUIS SEGAL, *Petitioners*, v. FEDERAL TRADE COMMISSION, *Respondent.*	No. .....

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners, Segal Lock & Hardware Company, Inc., Norwalk Lock Company, and Louis Segal, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals entered in the above case on August 8, 1944, affirming an order of the Federal Trade Commission.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported 143 (F 2d) 935 and is printed R. 742-745.

The Facts.

The petitioners are the Segal Lock & Hardware Company Inc., a New York corporation, and its subsidiary the Norwalk Lock Company, a Connecticut corporation. Also one of the petitioners herein is Louis Segal, the president and treasurer of both corporations which are engaged in the manufacture and sale in interstate commerce of locks and lock cylinders, marketed under the trade name "Segal-Pick-Proof" and formerly advertised by slogans as, "the only cylinder that is impossible to pick", "only your key will unlock it" and similar statements respectively and that petitioners' lock affords absolute security against *picking** and is the only lock which does so. Except for the expression "Segal Pickproof" the slogans referred to have long been discarded and are no longer used by the petitioners.

On September 16, 1939 the Federal Trade Commission issued its complaint against the petitioners, alleging that the representations above referred to constitute a violation of Section 5 (a) of the Federal Trade Commission Act, as amended, 15 USCA Section 45 and alleging that petitioners are guilty of unfair methods of competition under this Section.

Hearings were had before the Federal Trade Commission and on June 12, 1942 the Commission ordered that the petitioners cease and desist from using the term "pickproof" in connection with their locks or otherwise representing that their locks or lock cylinders *cannot be picked*.

During the hearings to prove its charge alleged in the bill of complaint that the Segal pickproof cylinder is not pickproof, the Federal Trade Commission called three witnesses, Robert E. Rusch, James E. Leurele, and Charles Courtney. Each testified, on behalf of the Commission, on direct examination to have successfully picked the Segal "pickproof" cylinder. Each however on cross-ex-

*Throughout petition italics ours.

amination refused to test his ability in regard to successfully picking the Segal "pickproof" cylinder by a public demonstration in open court and further refused to disclose the picking methods and picking instruments employed for such purpose. Rusch and Leurele relied on the privilege of trade secret. The Federal Trade Commission's attorney, Mr. Baughman, directed Rusch not to make the test (R. 302, fol. 905) in the presence of petitioners:

Mr. Baughman:

> "Just a minute I am going to say something here—forcing on him (Rusch)* the burden of showing him as being a witness that is not willing to cooperate and testify on what you are trying to get from him which is a secret which he should not be forced to divulge without being compensated and the Commission has taken the position up until now that it will not pay for doing that."

Mr. Palmer:

> "I gather this witness will not make a public demonstration."

Mr. Baughman:

> "He will not and I have so told you."

Leurele, also called on behalf of the Commission, likewise *refused* to make a public demonstration on instructions by government counsel, Mr. Baughman, as to picking or to divulge his picking method or instruments (R. 354, 355, fols. 1062-1065) in that he might disclose a trade secret. Asked on cross-examination to demonstrate his ability to open the Segal "pickproof" cylinder with any type of picking means, Leurele answered (R. 355, fol. 1065):

*Parenthetical inclusion added.

A. "No, I will not."

Q. "You refuse to do that, is that right? Yes or no."

Trial Examiner:

"He has refused, yes."

Every effort* to test the credibility of the witnesses Rusch and Leurele in respect to a disclosure or to demonstrate their ability to successfully pick the Segal pickproof cylinder was met by objection of counsel for the Federal Trade Commission who in each such instance was sustained by the Trial Examiner for the reason that a trade secret as to picking might be disclosed.

Coming now to the Government's last witness, Courtney. He also said that he successfully picked the Segal "pickproof" cylinder on direct examination but, like Rusch and Leurele on cross-examination refused to test or demonstrate his ability in the presence of petitioners (R. 432, fol. 1296). Further pressed to make a public demonstration (R. 434, fol. 1300), Courtney again refused to make the test.

Petitioners appealed to the Federal Trade Commission from the rulings of the Trial Examiner denying petitioners the right of fully cross-examining Rusch and Leuerele, and the Commission in its order of October 12, 1940 (R. 42-44) held that the tests by the Commission's witnesses shall be secret or in other words the tests on the Segal pickproof cylinder shall

> " * * * be picked in the presence of the Trial Examiner *alone*." (R. 44, fol. 130.)

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*R. 247, fol. 740; R. 251, fol. 753; R. 258, fol. 774; R. 295, fols. 883-885; R. 351, fol. 1051; R. 355, fol. 1065.

and that

> "* * * the production of the picking instruments of Rusch and Leurele and the performance of such demonstration would require the revelation of trade secrets." (R. 43, fol. 128.)

Following the Commission's ruling to hold the hearing in camera, such secret hearing was held wherein all the petitioners were excluded. Apparently both Rusch and Leurele attempted to pick the Segal "Pickproof" cylinders. The Trial Examiner in his findings stated that Leurele failed and that Rusch successfully picked the Segal "Pickproof" cylinders, one in thirty minutes, and another in four minutes. These findings were made by the Trial Examiner despite his earlier admission to the effect "I am not an expert in this line at all" (R. 286, fol. 857, third paragraph).

The secret hearing although held by the Federal Trade Commission was vigorously objected to by the petitioners on the ground that no trade secret was involved and on the further ground that such secret hearing arbitrarily and unfairly restricted petitioners' right to a fair cross-examination on the sole and dominant issue of the case.

The Commission also accepted the broad definition of "picking" by Rusch, Leurele and Courtney and in its findings ruled that

> "picking may be defined as the opening of a lock without the use of the original or duplicate keys and without damage to the lock." (R. 68, Paragraph Seven.)

The petitioners' witnesses, that is those that qualified as experts in the art of picking locks specified that the art of picking locks is common knowledge in the trade and involves *no trade secret at all.* Petitioners contend that to satisfy the definition of picking——

picking means must be employed to be within the plain meaning of the expression, "pickproof"—not *any* means to open a lock, as broadly laid down by the Commission.

Petitioners' experts further testified that each tested and tried to pick to the Segal "pickproof cylinder" many and many times and they found it to be *pickproof* and that it could *not* be successfully picked.

Statute Involved.

The statute involved is Section 5 (a) of the Federal Trade Commission Act, 52 Stat. 111; 15 U.S.C.A., Sec. 45. Its text in the appendix, *infra,* page 24.

Questions Presented.

1. Whether the hearing was so unfairly conducted by the Federal Trade Commission as to deprive the petitioners herein of the benefits of the Fifth Amendment of the Constitution.

2. Whether the petitioners' right of cross-examination has been prejudicially curtailed, and abridged and thus were denied a fair and impartial trial in accordance with established rules of procedure as guaranteed by our Constitution, the laws, and the decisions of our Courts.

3. Whether the Federal Trade Commission exceeded its constitutional authority by acting unjustly and arbitrarily and in an absolutely unreasonable manner by fixing its findings without substantial evidence to support its conclusions.

4. Whether the Federal Trade Commission disregarded the rules of evidence, and capriciously made findings by administrative fiat.

5. Whether the Federal Commission's findings that the petitioners' lock cylinder is not pickproof, are supported by substantial evidence, in view of the *systematic denial* by the Commission of the petitioners' right to cross-examine Rusch and Leurele, the Commission's witnesses, for purposes of testing their accuracy, ability, veracity and credibility.

These questions bring up the collateral questions:

6. Whether the Federal Trade Commission acting in the interest of the public may under the guise of privilege shield its own witnesses in a secret star chamber hearing wherein the petitioners over their objections were *excluded from the ascertainment of the truth of the sole and material issue in the case,* and limit and restrict petitioners' inalienable right to a full cross-examination of the Commission's *shielded witnesses* on dominant facts necessary and material for the proper and fair determination of the sole question involved herein, namely, whether the Segal cylinder lock is, or is not pickproof.

7. Whether as a matter of law where the crux of the case on behalf of the Federal Trade Commission depends solely upon the revelation of a self-styled trade secret and characterizes the only material and relevant issue, such trade secret, if any, must be disclosed as a matter of public policy in the interest of the ascertainment of the truth if required on cross-examination, or the case falls for lack of proof or substantial evidence to support the charge of the bill of complaint.

Assignment of Errors.

The Circuit Court of Appeals erred:

1. In entering a decree affirming and enforcing the order of the Federal Trade Commission even though such decree is based on no substantial evidence.

2. In ruling that the trial before the Federal Trade Commission was fairly conducted.

3. In ruling that there was no serious limitation of the right of cross-examination depriving petitioners of a fair hearing.

4. In ruling that the secret demonstrations with respect to picking by the government's witnesses, Rusch and Leurele, before the Trial Examiner *alone*, to the exclusion of the petitioners was not unfair.

5. In accepting the Federal Trade Commission's arbitrary definition of picking which is contrary to the accepted and well recognized definition in the trade, and

6. In ruling that where the evidence is conflicting, the Commission's decision must be accepted as final.

Reasons for Granting the Writ.

First: The petitioners were deprived of the benefits of the provisions of the Fifth Amendment to the Constitution of the United States by the Federal Trade Commission in denying the petitioners a reasonable latitude in cross-examining the Commission's witnesses, Rusch and Leurele with respect to the only essential charge remaining in the bill of complant, namely, whether the Segal cylinder is pockproof, or is not pickproof.

SECOND: The Federal Trade Commission exceeded its constitutional authority in relying on a secret hearing for shielding its witnesses, Rusch and Leurele, and in systematically limiting the petitioners' right to cross-examine these witnesses.

THIRD: The case presents an important question of Federal Law which has not been decided and should be decided by this Court, that is, whether a United States Administrative Bureau, such as the Federal Trade Commission, acting in the interest of the public as a prosecutor may under the guise of privilege rely on a secret hearing in which the petitioners and the public are excluded with respect to the sole and major issue in the case, and because of such secret hearing rendered findings based on no substantial evidence resulting in confiscation of property of the petitioners without due process of law. The public importance of this question is obvious and its final determination is essential.

FOURTH: The opinion of the Circuit Court of Appeals relative to the right of the petitioners to cross-examine the Government's witnesses, Rusch and Leurele is in direct conflict with prior decisions of the United States Supreme Court and of prior decisions rendered by the United States Circuit Court of Appeals of other circuits.

FIFTH: The denial of reasonable latitude by the Federal Trade Commission in cross-examining a witness is a prejudicial and reversible error.

SIXTH: That each of the matters passed upon in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority.

For reasons herein outlined petitioners pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, N. Y., November 1, 1944.

Respectfully submitted,

SEGAL LOCK & HARDWARE CO., INC.,

LOUIS SEGAL,
President and Treasurer.

NORWALK LOCK COMPANY,

LOUIS SEGAL,
President and Treasurer.

LOUIS SEGAL (L. S.)

CHARLES M. PALMER,
Counsel for Petitioners.

Affidavit.

State of New York, }
County of New York. } ss.:

Louis Segal, being first duly sworn, deposes and says, that he is personally one of the petitioners herein; that he is the president and treasurer of the Segal Lock & Hardware Co., Inc., also one of the petitioners herein; and that he is the president and treasurer of the Norwalk Lock Company, also one of the petitioners herein, for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters herein stated to be alleged on information and belief, and that as to those matters he believes it to be true; and that this petition is made in good faith and not for purposes of delay.

Louis Segal (L. S.)

Subscribed and sworn to before me this 1st day of Nov., 1944.

Michael Kohen,
Notary Public.

Brief in Support of Petition.

First: The petitioners were deprived of the benefits of the provisions of the Fifth Amendment to the Constitution of the United States by the Federal Trade Commission in denying the petitioners a reasonable latitude in cross-examining the Commission's witnesses, Rusch and Leurele with respect to the only essential charge remaining in the bill of complaint, namely, whether the Segal cylinder is pickproof, or is not pickproof. In the attempt to prove its contention that the Segal cylinder is not pickproof, the Commission held the secret hearing by claiming privilege over the petitioners' objections. Since the sole issue in the case at bar is directed to the determination whether the Segal pickproof cylinder is pickproof or whether it is not pickproof, the right of cross-examination in respect to this material issue should not have been limited or abridged by a secret hearing on the part of the Commission under the guise of a trade secret, which has been proved by the petitioners by a preponderance of the evidence as *no trade secret at all.* The petitioners right to a *searching* cross-examination to test the ability of the government's witnesses, Rusch and Leurele was thus clearly prejudiced. *Alford* v. *United States,* 282 U. S. 687.

The issue here is not whether a door can be opened by the Commission's witnesses without the use of keys and without damage to the cylinder, or to the technique to that end. The issue is directed to the expression "pickproof" and not to the "openproof" characteristics of a door. Specifically the issue is whether the Segal cylinder can be picked successfully by "picking means". Petitioners were denied *to test this fundamental right on cross-examination.* Accordingly the Commission failed to establish the real truth by a secret hearing.

If the petitioners had been allowed to pursue this most proper line of cross-examination, the credibility of these

witnesses, Rusch and Leurele may have been completely destroyed, and different findings returned.

SECOND: The Federal Trade Commission exceeded its constitutional authority in relying on a secret hearing for shielding its witnesses, Rusch and Leurele, and in systematically limiting the petitioners' right to cross-examine these witnesses. This Court has stated in the case of the *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88, (middle p. 93)

> "* * * for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute."

The Commission relied on "privilege", namely, a trade secret to exclude the petitioners from having access to the tests by Rusch and Leurele, and arbitrarily and systematically restricted petitioners' cross-examination of these witnesses. Because of events that occurred at the secret hearing, the Commission held that the Segal cylinder is not pickproof. By such action, it is submitted that the Commission acted beyond its constitutional power for there was *no substantial evidence apart from the secret hearing to sustain the Commission's order to cease and desist.*

In fact the petitioners were denied the right to a *searching* cross-examination—for the best evidence offered on behalf of the Commission was cloaked in secrecy by the Commission under the guise of a trade secret.

Thus petitioners did not know what evidence was offered or considered and therefore could not test, refute or explain away what took place at the secret hearing instituted by the Commission.

The petitioners realize that the Commission's findings as to the facts "if supported by evidence, shall be con-

clusive" 15 USCA Section 45 (C). *Federal Trade Commission* v. *Standard Educational Society*, 302 U. S. 112. This provision, however, is interpreted as requiring *substantial evidence* as the basis of its findings in order to render them conclusive. *J. B. Lippencott Co.* v. *Federal Trade Commission*, 137 F. (2nd) 490, 491 (C.C.A. 3).

In the case at bar, Rusch and Leurele each on direct examination merely said that they successfully picked the petitioner's pickproof cylinder. But each on cross-examination refused to make an open demonstration in Court in the presence of the petitioners. The only evidence apart from the secret hearing is *mere self serving voluntary statements* by the Commission's witnesses. This is *no proof* of any evidentiary value.

Mere voluntary statements that one can successfully pick the Segal pickproof cylinder unless backed up by tests accessible to the petitioners do not amount to *bona fide* proof that the Segal cylinders *are not* pickproof. Nor would such statements or secret demonstrations characterize *bona fide* evidence in conflict with petitioners' evidence that the Segal pickproof cylinder in fact *is pickproof*. Thus *Benton Announcements* v. *Federal Trade Commission*, 130 (F. 2nd) 254, relied on by the Court below, does not apply in that it involved no secret hearing or serious limitations of cross-examination to preclude the determination of the real truth directed to the only issue in the case.

THIRD: The case presents an important question of Federal Law which has not been decided and should be decided by this Court, that is, whether a United States Administrative Bureau, such as the Federal Trade Commission, acting in the interest of the public as a prosecutor may under the guise of privilege rely on a secret hearing in which the petitioners and the public are excluded with respect to the sole and major issue in the case, and because

of such secret hearing, render findings resulting in confiscation of property of the petitioners without due process of law. The public importance of this question is obvious and its final determination is essential.

With its great resources at command and great choice of witnesses, the Federal Trade Commission should have called witnesses that could be subjected to a fair and searching examination without resort to a star chamber proceeding and without relying on the cloak of privilege.

In *Du Pont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100, cited by the Court below, plaintiff, the employer, sought to restrain the disclosure of a trade secret by the defendant, a former employee. Hence the defendant stood in confidential relationship with his former employer. This was purely a private affair for this is a question directed to an abuse of the trust reposed on the employee concerning a trade secret. This case is thus not in point. The case at bar clearly distinguishes from *Du Pont de Nemours Powder Co.* v. *Masland, supra*, for here, the Government *is the prosecutor* and has the burden of proving certain allegations of the bill of complaint but unjustifiably attempts to do so under the guise of a trade secret in a hearing which completely sealed off the petitioners, and the petitioners' counsel. There was no confidential relation between the petitioners and the Federal Trade Commission. In fact since the Commission in the interest of the public initiated the proceedings herein, it had the duty to prove its charge, openly and fairly with no strings attached or secret reservations.

FOURTH: The opinion of the Circuit Court of Appeals relative to the right of the petitioners to cross-examine the Government's witnesses, Rusch and Leurele is in direct conflict with prior decisions of the United States Supreme Court and of prior decisions rendered by the

United States Circuit Court of Appeals of other circuits. *Tla-Koo-Yel-Yee* v. *United States*, 167 U. S. 274; *The Ottawa* v. *Stewart*, 70 U. S. 268; *Farkas* v. *United States*, 2 (F. 2nd) 644, C.C.A. 6; *Furlong* v. *United States*, 10 (F. 2nd) 492 C.C.A. 8; *Alford* v. *United States*, 282 U. S. 687, and *Clark* v. *Federal Trade Commission*, 128 (F. 2nd) 542, C.C.A. (9). The bill of complaint charges that the Segal pickproof cylinder is not pickpoof. The Commission set out by a secret hearing to prove the only issue now in the case at bar. The petitioners were thus excluded from testing this issue. There was no opportunity to test the ability of the witnesses on cross-examination to identify the Commission's witnesses in their environment or reveal facts tending to discredit their testimony. Where a witness is called upon by the Government to prove an essential and material fact, charged in the bill of complaint, testimony to such fact *must be disclosed*, where it is essential and material to the ascertainment of the truth, even though a trade secret may be involved. For the very purpose of cross-examination is to test the accuracy of the witnesses. Wigmore Evidence, 3rd Ed., Vol. 8 (§22212), referred to by the Court below announces the general rule with respect to disclosure of a trade secret:

> "Finally even where the claimant of the privilege is not a party charged with fraud, *no privilege of secrecy should be recognized* if the rights of possibly innocent persons depend *essentially or chiefly* for the ascertainment upon the disclosure in question.
>
> In short the privilege should be conceded in those cases *only* where the disclosure of the facts by the particular channel of the witness in question is but a *subordinate means* of proof relative to the other evidence available in the case; for without such limitation the general principle can-

not be enforced, that *testimonial duty to the community is paramount to private interest* and no man is to be denied his rights merely because another possess the facts without which the right cannot be ascertained and enforced."

In other words, no privilege of secrecy attaches where the rights of innocent persons depend *essentially and chiefly* upon disclosure for the ascertainment of the truth. Privilege attaches where the disclosure of the trade secret is but a *subordinate means of proof* in the light of other evidence available. In the case at bar, the rights of the petitioners *depends upon disclosure* of the so-called trade secret. For it is the only issue. In fact the revelation of a trade secret was insisted upon by the Federal Trade Commission in *Clark* v. *Federal Trade Commission, supra,* wherein the Circuit Court affirmed the decision* of the District Court which held that a *trade secret must be disclosed* because the question was *material,* and *because the present tendency of the law is to require a person to answer questions that are necessary to be answered in ascertaining the truth especially where the government through the Federal Trade Commission is acting in the interest of the public.*

In the case at bar, the Federal Trade Commission although having the burden of proof to sustain the charge of the bill of complaint, attempted to satisfy such burden by interposing a self styled trade secret *behind sealed doors* to the exclusion of the petitioners even though the *whole case depended chiefly* and *solely on disclosure for the ascertainment of the truth to warrant a fair trial.*

FIFTH: The denial of reasonable latitude in cross-examining a witness is prejudicial error. In *Alford* v.

*The proceedings before the District Court are in part set out on page 262, lines 7-11, penultimate paragraph, Federal Trade and Law Practice by Henry W. Beer, 1942 Edition.

United States, 282 U. S. 687, 694, the cross-examination was limited over the objection of counsel, this Court held:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the Trial Court. It may exercise a reasonable judgment in determining when the *subject is exhausted. Storm* v. *United States*, 94 U. S. 76, 85; *Rea* v. *Missouri*, 17 Wall. 532, 542-543; *Blitz* v. *United States*, 153 U. S. 308, 312. * * * The Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In the case at bar, there was no opportunity to place the Government's witnesses in their proper setting and put the weight and credibility of these witnesses to proper test. Petitioners were denied a full cross-examination *to exhaust* such cross-examination. Thus one of the safeguards essential to a fair trial was denied the petitioners.

As a further indication of the arbitrary manner in which the hearing before the Federal Trade Commission was conducted, attention is respectfully directed to the fact that on re-direct examination of the witness Rusch, the attorney for the Commission *opened the door for a full cross-examination* but the Trial Examiner insisted that the Commission decide the question. For example, on redirect, Government counsel asked Rusch R. 311, 312, fols. 933, 934:

> Q. "I will ask you did you use a pick to open the Segal pickproof cylinder?
>
> A. Yes, we used a pick to pick the cylinder open."

Mr. Palmer:

> "I maintain that opens the door in respect to all these questions that we have consolidated, the witness has definitely committed himself that the pick he has been using was a certain type, and we have a right to inquire what type of pick it was."

Trial Examiner Addison:

> "That certainly sounds quite plausible, but there is no way we can properly introduce it now, in my opinion. The Commission will have to pass on that question."

On re-cross, since Rusch designated on re-direct that he used a pick, he was asked (R. p. 313, fols. 938, 939):

> Q. "Will you describe the pick that you used in picking the particular Segal pick-proof lock?"

Mr. Baughman:

> "I object."

Trial Examiner Addison:

> "Same ruling. Objection sustained, exception noted."

Mr. Palmer:

> "Now, I think the Government's attorney has opened the door, to a complete disclosure on the part of this witness. He has testified, and he has specified directly on the rebuttal* examination that he used the pick. We have a right to inquire what kind of a thing it was and to call for the production of this particular pick."

*Re-direct.

Trial Examiner Addison:

> "I have conceded the plausibility of that argument, but I would rather have the Commission pass on it."

The Commission instead of granting the petitioners the right to an exhaustive cross-examination relied on the secret hearing even though the Government attorney opened the door for a full cross-examination. The Commission's order to cease and desist therefore is confiscatory, arbitrary, and unwarranted since its decision which has been sustained by the Court below is based on *no substantial evidence*.

The Supreme Court of the United States has set down the following proposition of law in *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U. S. 88 (at pp. 91, 92):

> " • • • the right to a full hearing and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean the Commission had a power possessed by no other administrative body, or tribunal under our Government. It would mean that where the rights depend upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority however beneficially exercised in one case could be injuriously exercised in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power. • • •
>
> In a case like the one at bar, the Court will not review the Commission's conclusions of fact • • •

by passing upon the credibility of the witnesses or in the conflicts of testimony. But the legal effect of evidence is a question of law. *A finding without evidence is beyond the power of the Commission.* An order based thereon is contrary to law and must in the language of the statute 'be set aside by a Court of competent jurisdiction'."

SIXTH: That each of the matters passed upon in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority. The chief value and purpose of cross-examination is to test and, if the circumstances warrant it, to destroy the credibility of a witness. This is accomplished by discrediting the witnesses.

The Supreme Court of the United States has laid down the rule as follows:

> "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief; and the time and place when and where they occurred, and the attending circumstances; and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness." *The Ottawa* v. *Stewart*, 70 U. S. 268, 271.

Jones in his Commentary on the Law of Evidence (2nd Ed.), Volume 5, Section 2345, announces the rule as follows:

> "The party who produces a witness vouches for his credibility, but the cross-examiner sustains

> no such relation to the witness and has full liberty to test his credibility. For the purposes of testing the credibility of a witness it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclinations and his prejudices."

Further on in the same section *Jones* states:

> "It is said that a witness may be asked any questions which tend to test his *accuracy*, veracity or credibility or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosyncrasies may be revelant."

The opinion of the Circuit Court of Appeals below should not be allowed to stand as a future guidance and precedent, for apart from laying down erroneous rules of law, it also does so in direct conflict with prior decisions of long standing, denying petitioners the benefits of the Fifth Amendment of the Constitution.

It is believed that the foregoing demonstrates that if the rulings of the opinion below are not set aside, petitioners' right of cross-examination of adverse witnesses, one of the most valuable rights for the establishment of the truth will be curtailed and abridged; petitioners will be charged and tried by offenses as formulated by the Federal Trade Commission and by government attorneys and not as found; and petitioners will be deprived of a fair and impartial trial in accordance with our established rules of procedure guaranteed by our Constitution, and the laws and decisions of our Courts.

For reasons urged petitioners respectfully pray that this Honorable Court issue a writ of certiorari to the

United States Circuit Court of Appeals for the Second Circuit to the end that the questions involved may be fully presented and argued and justice be done in the premises.

Dated, Washington, D. C., November 6, 1944.

CHARLES M. PALMER,
Counsel for Petitioners.

Certificate of Counsel.

I HEREBY CERTIFY that I am counsel for the petitioners in the above identified cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and said petition is not interposed for purposes of delay.

CHARLES M. PALMER,
Counsel for Petitioners.

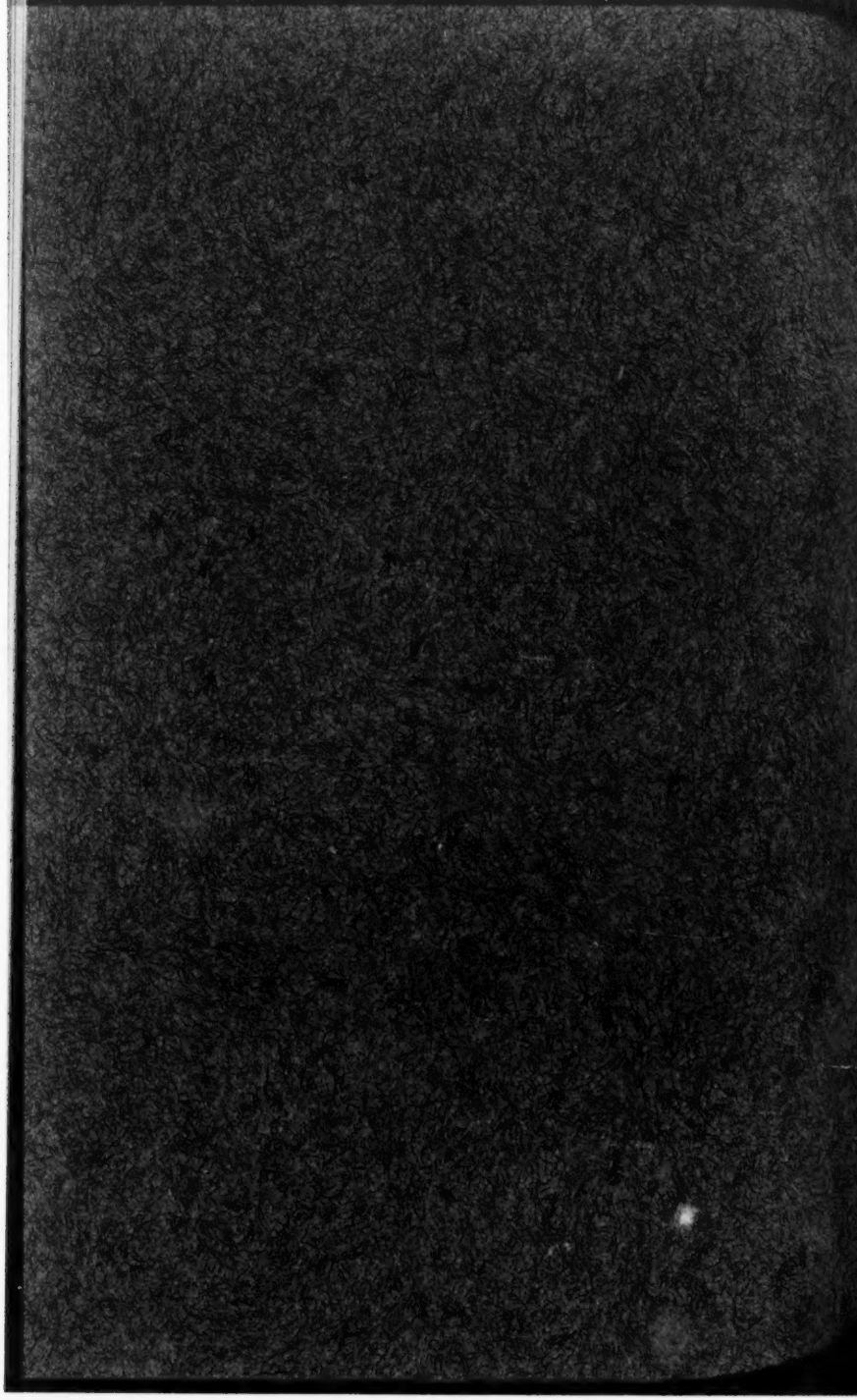
Dated, Washington, D. C., November 6, 1944.

APPENDIX.

Statute Involved.

Section 5 (a) of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45 provides as follows:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockhards Act, 1921, except as provided in Section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 657

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY, AND LOUIS SEGAL, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 742) is reported in 143 F. (2d) 935.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 8, 1944 (R. 755). The petition for a writ of certiorari was filed on November 6, 1944. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15

U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Commission's finding that petitioners' lock is not pick-proof is supported by substantial evidence.

2. Whether the Commission denied petitioners a fair hearing.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission charged petitioners with using unfair methods of competition, and unfair and deceptive practices in commerce (R. 10–11). After a hearing the Commission made the following findings:

Petitioners (Segal Lock and Hardware Company, Inc., Norwalk Lock Company, its wholly owned subsidiary, and Louis Segal, the president and treasurer of both corporations) are engaged in the manufacture, sale, and distribution in interstate commerce of locks and lock cylinders, including a cylinder which is variously designated as the Segal Pick-Proof Lock Cylinder and Segal Pick-Proof Cylinder (R. 65). Petitioners advertise this lock cylinder extensively through advertisements in newspapers, periodicals, and trade journals, as well as by circulars and radio broadcasts (R. 66). In these advertisements petitioners represent that their lock cylinder cannot be picked (R. 68).[1]

The Commission found that picking a lock means opening it without the use of the original or duplicate keys and without damage to the lock (R. 68); that petitioners' lock is not in fact pick-proof (R. 70); that petitioners' representations

[1] Petitioners make the following claims for their product (R. 67):

"Impossible to Open By Any Method of Lock Picking."

"It cannot be picked, or opened, by any skill, art or machine."

"Nothing But the Proper Key Will Open It."

"The First Absolute Guarantee of Complete Safety From The Lock-Picking Menace."

"The New Segal Cylinder is absolute proof against lock-picking and is the only certain protection against the dangerous picking gun."

"The only genuine pick-proof cylinder ever invented."

"It will protect your home and possessions by making the lock on your door *absolutely* pick-proof."

with respect to the invulnerability of their lock are erroneous and misleading (R. 72); and that petitioners should therefore be required to cease and desist from representing that their lock cannot be picked (R. 73–75). Upon petition for review, the court below affirmed the Commission's order (R. 754).

ARGUMENT

The Commission's finding that petitioners' lock is not pick-proof is supported by substantial evidence. Petitioners contend that picking a lock means opening it by the conventional picks or instruments ordinarily used by locksmiths and burglars (R. 743). The Commission found, however, that a lock is not pick-proof if it can be opened in any manner without using the original or duplicate keys and without damaging the lock (R. 68). This definition was based upon the testimony of numerous expert witnesses (R. 328, 383–384, 513, 527, 533). Furthermore, each of three locksmiths testifying for the Commission declared that he had successfully picked the Segal Lock—one of them several dozen times and the other two from thirty to forty times (R. 69, 234, 335, 399). Six witnesses called by Segal testified that they had failed to pick the lock (R. 69); but the Commission was free to infer from their testimony only that some locksmiths cannot pick the lock. Since the evidence was conflicting, the Commission's findings will not be set aside. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117.

Petitioners contend that they were denied a fair hearing because they were excluded from a demonstration before the examiner by two expert locksmiths who undertook to pick the Segal Lock, and because they were not permitted to make a full cross-examination of these witnesses (Br. 13). For purposes of this demonstration three Segal Locks were purchased at random from hardware dealers by petitioners' counsel. Two of these locks were successfully picked by one of the witnesses without damage to the locks, the first lock in thirty minutes and the second lock in four. The second witness attempted to pick the third lock, but his instruments became caught in the lock cylinder; his attempt to open the lock was therefore abandoned. All persons except the examiner were excluded from this demonstration because the witnesses regarded their picking methods as a trade secret and refused to reveal their tools and technique (R. 69). On cross-examination these witnesses refused to answer questions seeking to expose their esoteric methods, and in this they were upheld by the examiner (R. 293–296, 343–344, 471).

Petitioners were not thus denied a fair hearing. In view of the Commission's finding as to what picking a lock means, the issue was not how the locks were picked but whether they could be opened without keys and without damage to the lock. If the locks could be opened in any such way, they were not pick-proof. Petitioners were not denied cross-examination with respect to that

issue. And, for the same reason, it was not unfair to exclude petitioners from the demonstration before the examiner. Petitioners affixed the locks and saw the door opened without damage to the locks and without the use of keys (R. 744–745). All they were deprived of was the privilege of seeing how it was done—and this was a trade secret which need not be disclosed "except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth." 8 Wigmore, *Evidence* (3d ed.) § 2212; *Crocker-Wheeler Co.* v. *Bullock,* 134 Fed. 241, 246 (S. D. Ohio). See *E. B. Muller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 519–520 (C. C. A. 6).

CONCLUSION

The decision below is correct, and no question of importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Federal Trade Commission.

DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

Office - Supreme Court, U. S.
FILED
JAN 26 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 657.

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY and LOUIS SEGAL,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING.

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LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY and LOUIS SEGAL, *Petitioners,* v. FEDERAL TRADE COMMISSION, *Respondent.*	No. 657.

PETITION FOR REHEARING.

This is a petition for rehearing from the order of January 2, 1937 of this Court, denying the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition is submitted to this Court with the greatest respect and in good faith.

That a serious injustice has been done to the petitioners is apparent for there are no legal authorities to support the Commission's findings.

The decision below is erroneous and contrary to the facts.

The findings of the Commission are based on **no evidence whatsoever.***

The decision below is contrary to the great weight of authorities.

*Throughout petition emphasis ours.

There is no point of law relied on by the Commission which sustains the view that a **star chamber proceeding is justified.**

In this matter, the Federal Trade Commission has been arbitrary and has exceeded its authority.

There has been a serious and systematic miscarriage of justice in this case.

No federal agency has the right to deny a fair hearing. This has been done by the Federal Trade Commission.

No federal agency has the right to make a charge unless it proves such charge in an open and fair hearing **based on evidence.**

And it should not resort as in this matter to exclude the petitioners and the petitioners' attorneys and conduct a secret hearing on the only and relevant issue in the case, to wit, whether the petitioners' lock cylinder is "pick-proof".

Where the issue is material, proof is required in open court even assuming a trade secret may be involved.

Ironically, the case of *Crocker-Wheeler Co.* v. *Bullock*, 134 Fed. 241, **relied on by the Commission, in fact supports the petitioners' contention** with respect to the general rule as to trade secrets. In the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, on page 245, the general rule as to trade secrets is set forth.

> "* * * if the giving of the testimony sought or the production of the documents called for will disclose what are characterized as 'trade secrets', the witness has a legal privilege to withhold **if it or they are irrelevant or otherwise inadmissible in evidence.** Wigmore on Evidence, Volume 3, Section 2212 * * *."

In other words, the privilege attaches **if the secret is immaterial and irrelevant to the issue, but if pertinent, it must be disclosed for the ascertainment of the truth. In**

the case at bar the real truth has never been ascertained because all of the pertinent and material facts with respect to the issue, namely, whether the Segal pickproof cylinder is pickproof was shrouded and sealed up in the secret hearing from which the petitioners and the petitioners' attorneys were systematically excluded.

In Section 2212 of Wigmore referred to in *Crocker-Wheeler Co.* v. *Bullock, supra*, it is further stated on page 245:

> "What the state of the law is would be difficult to disclose precisely. It is clear that **no absolute privilege for trade secrets is recognized**. On the other hand, courts are not apt to require disclosure except in such cases and to such an extent as may appear to be **indispensable for the ascertainment of the truth**. More than this in definition can as yet hardly be ventured."

And further with respect to trade secrets, the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, further enunciates, bottom page 245:

> "The only serious question here is whether disclosure of trade secrets should be enforced **if they are relevant and admissible in evidence.** The last quotation from Wigmore indicates that in his opinion **it should be** provided they are indispensable for the 'ascertainment of the truth'. This is further indicated by the statement:"
>
> > "No privilege of secrecy should be recognized if the right of possibly innocent persons depends essentially or chiefly upon the disclosure in question."

Further on page 246 in the case of *Crocker-Wheeler Co.* v. *Bullock*, Judge Wallace stated:

> **"Considerations of inconvenience must give way to the paramount rights of litigants to resort to evidence which it may be in the power of the witness to produce and without which grave interest may be jeopardized and the administration of justice thwarted."**

And further on page 246 in the case of *Crocker-Wheeler Co.* v. *Bullock*, we find this important and salient statement:

> "The Court generally inclines towards this application and **requires an answer whenever it seems probable the testimony may be relevant.**"

It is obvious from the teachings of the case of *Crocker-Wheeler Co.* v. *Bullock* that the Federal Trade Commission violated the general rule with respect to trade secrets for all testimony relating to the performance and ability of the Commission's witnesses to pick open the petitioners' cylinder lock, is relevant and material, and therefore must be disclosed. Moreover, in the case at bar petitioners also **proved beyond a reasonable doubt that the art of picking locks is notoriously old and involves no trade secret whatsoever.**

In the case at bar, the Commission not only denied the petitioners the right to cross-examine the Commission's witnesses with respect to what picking means they employed in the secret hearing, but further excluded the petitioners and their attorneys from seeing the Commission's tests. Hence the credibility of the Commission's witnesses could not be attacked by the petitioners.

Moreover **the Commission has confused the issue.** The charge in the bill of complaint by the Federal Trade Commission specified that the petitioners' lock cylinder was **not pickproof.**

All that was required to prove such charge was to have a public demonstration, *not a secret* demonstration excluding the petitioners and their attorneys.

The Commission, therefore, failed in its duty to the public as the **real truth has not been determined.**

Instead it swung the magic wand in the secret hearing and *ipso facto*—the petitioners' cylinder was held to be not pickproof.

Findings of this sort by the Commission are thus absurd for they are based on no evidence.

Furthermore, a careful review of the authorities cited on behalf of the Federal Trade Commission discloses that **there is no case in point which sustains the Federal Trade Commission's contention to substantiate the fact that a secret hearing was proper,** for example, in the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, the action therein was for breach of contract. A subpoena *duces tecum* was issued for the production of certain books. The question was whether these books *were relevant* even though they contained confidential information. The Court held the books *not* relevant to the issue and held their production would be prejudicial.

If the books *were relevant* to the issue, obviously the Court would have held and would have ordered them produced even though prejudicial.

A careful analysis of the other cases relied on by the Commission, to wit, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 and *Muller, E. B. & Company* v. *Federal Trade Commission*, 142 F. 2nd 511, **likewise are not in point.** These cases stand for the proposition that the Commission's findings are conclusive **if supported by the evidence.** Moreover in these cases no trade secret was involved.

In the case at bar, there is *no evidence at all* to support the Commission's findings since they are based on a *star chamber proceeding*, the secret hearing.

Fair Play—the Proceedings Before the Federal Trade Commission Were Extremely Unfair.

True administration of justice was thwarted by the Federal Trade Commission. There was no fair hearing. There were no findings based on fact or on evidence. The findings were not warranted by the record. The right to a full and fair hearing is one of the substantial rights of a litigant. The right to a *full cross-examination was systematically thwarted by the Federal Trade Commission* as the record clearly shows.

The Federal Trade Commission's Smoke Screen.

The Commission has raised a smoke screen to camouflage the real issue. The Commission erroneously is under the impression that this contest is principally concerned with its definition as to pickproof and with the definition insisted upon by the petitioners.

The Commission and the court below thus short circuited the real issue, namely, whether the petitioners' lock cylinder is or is not pickproof. **Only open demonstrations accessible to the petitioners can prove this fact.** These demonstrations are relevant and material to the issue for the issue is directed to the use of the expression "pickproof".

Dangerous and Damaging Precedent Established by the Federal Trade Commission.

Petitioners' "pickproof" cylinder was designed to resist marauders and criminals from breaking into homes. In other words, this pickproof cylinder in a way is an arm of good Government. By the Commission's actions, the petitioners have been placed in a wrong position and have been unjustifiably treated to deprive them of their Constitutional rights to a fair hearing and fair cross-examination of the Commission's witnesses.

If this case is not heard by this Court, it will mean that the Federal Trade Commission or any other governmental tribunal has the right to hold a "one-sided" hearing based on a pseudo trade secret, and thereafter set down findings based on no evidence. This is a dangerous precedent and it is respectfully submitted should not be permitted by this Court.

The Federal Trade Commission's Secret Hearing is Vicious and Contrary to Good Public Policy.

It is earnestly urged that the Court reanalyze petitioners' brief for the writ of certiorari requested. Even if the Commission's *disputed definition* be accepted, that is, "picking may be defined as the opening of a lock without the use of the original or *duplicate key* and without damage to the lock", there is nothing in the record to indicate that the Commission's witnesses as such **in the secret hearing did not fashion or build a duplicate key. The Trial Examiner did not realize that a duplicate key may have been built up or fashioned by the use of picks by the Commission's witnesses in the secret hearing. Petitioners could not refute this statement because they had no knowledge of what was going on in the secret hearing involving the secret demonstrations by the Commission's witnesses.** At any rate, the findings by the Commission are based on a secret hearing and, therefore, should not bind the petitioners.

The Tests Were Not Conducted for the Protection of the Petitioners' Rights.

The tests in camera proved nothing. Petitioners had a right to be present. To observe and see the demonstrations by the Commission's witnesses. These tests were *relevant to the issue.* Thus the test should have been in the open and accessible for the issue is limited to the *pick-*

proof characteristics of petitioners' lock. There are no other issues. *The petitioners are not concerned with methods of picking as the Commission would desire to have this Court believe.* The only question to be determined is whether the petitioners' cylinder is pickproof or is not pickproof. The secret hearing by the Commission did not answer this question—certainly not through the unfair hearing in this case.

Question of Great Public Importance.

The question whether a federal bureau following its bill of complaint in the attempt to prove the alleged charge of the bill of complaint has the right to exclude the parties charged from the hearing, on facts relevant to the issue, should be decided by this Court. This question is of great importance to industry and to the public at large. This Court, it is believed, has never decided this question. **And the only cases in point substantiate petitioners' contention.**

In view of the foregoing, petitioners respectfully request that the Court's action in declining to grant the writ of certiorari be reconsidered and thereafter granted.

January 26, 1945, Washington, D. C.

Respectfully submitted,

CHARLES M. PALMER,
Attorney for Petitioners.

I hereby certify that the foregoing petition for rehearing has been presented in good faith and not for purposes of delay and is well founded in law and in fact.

CHARLES M. PALMER (L. S.)